No. 87-1992

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

PETER KERO,

Petitioner,

vs.

CHARLES MOREL, JR., Individually and CHARLES J. MOREL, JR. BUILDERS, INC., a New Jersey Corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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STATEMENT OF THE CASE

The respondent will accept those facts asserted by the petitioner solely for the purpose of this presentation to the United States Supreme Court.

SUMMARY OF ARGUMENT

The decision below was rendered in absolute conformity with the power vested in the New Jersey Superior Court, Chancery Division to fashion an equitable remedy in the instant case. There is no basis for the claim that the remedy in effect constitutes a confiscatory taking without compensation which would abridge petitioner's due process rights. Thus, petitioner may not properly invoke the jurisdiction of this Court pursuant to 28 U.S.C. Section 1257(3).

ARGUMENT

The legal principles which govern the decision below have been well established by the court for many years. The court did not, in effect, re-write the contract as petitioner asserts. Rather, it ordered that specific performance be awarded to the respondent because petitioner failed to process the subdivision application as agreed to and specified in the terms of the contract. Petitioner's claim that the remedy fashioned was beyond the limits of the court's power is unfounded. The court below was acting well within the scope of its authority. Equitable remedies "...are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so

as to fit the changing circumstances of every case and the complex relations of all the parties." *Sears Roebuck & Co. v. Camp,* 124 N.J. Eq. 403, 411-412 (E. & A. 1938), 1 A.2d 425.

The opinion rendered by the trial court drew an important distinction between specific performance of the agreement to process the application and specific performance of the contract of conveyance. It is undisputed that a decree of specific performance of a contract may be untenable where that contract is subject to approval which rests in the discretion of a third party. However, there is no impropriety in the court's having ordered specific performance of the agreement to process the subdivision application where the evidence clearly shows petitioner did not demonstrate the requisite due diligence to pursue the application itself.

Petitioner further contends that the decision rendered by the trial court, whereby respondent, in conjunction with the Montville Township Planning Board, was authorized to design the subdivision, make the application for subdivision approval and construct the necessary municipal improvements, all at petitioner's expense, is tantamount to a confiscation of petitioner's property. He alleges that vesting such authority in respondent signifies a blatant conflict of interest that would certainly deprive petitioner of the proceeds due him as contemplated by the terms of the contract. Clearly, respondent is even more motivated than petitioner to obtain approval of the subdivision application as expeditiously as possible, thus enabling the conveyance to go forward. Petitioner and respondent alike have such an interest. Insofar as the petitioner will be compensated for the sale of land only with the approval of the Planning Board, the respondent's interest in expediting this approval lies in the fact that he must

first build and then sell the proposed units before he will realize a profit. Indeed, to safeguard against concerns about respondent's using inappropriate or excessive measures to petitioner's detriment, the lower court offered to appoint a third party to ensure that respondent proceeded with economy, efficiency and dispatch. (Pa 19 to 20). Finally, the court ordered that respondent issue regular status reports to petitioner. (Pa 41 to 42). Thus, petitioner should be precluded from advancing an expropriation claim merely by virtue of his anticipating some as yet unquantified injury to himself.

Petitioner asserts that he raised the issue of a violation of due process in the trial court when, in response to the judge's indication that he could order respondent to proceed with the subdivision application and charge him for it, petitioner responded "that would be unreasonable." (Pa 19).

Petitioner then contends that his reference in the Appellate brief that such an order was "...tantamount to a confiscation of defendant's property" amounted to a due process argument. (Pa 49). Finally, petitioner claims to have raised the issue on a third occasion in his petition for certification to the New Jersey Supreme Court. There he theorized that the lower court's order in effect made respondent the petitioner's agent and, in the face of their contrary interests, they could not possibly maintain a valid fiduciary relationship. (Pa 50).

To comply with the court's jurisdictional requirements petitioner must have "...specially set up or claimed under the Constitution...of...the United States..." the right he now seeks to have the court enforce. 28 U.S.C. Section 1257(3). The requirement necessitates that petitioner assert a clear and specific

violation of this federally protected right in order to prevail. This Court specifically addressed the stringency of this requirement in *Webb v. Webb*, 451 U.S. 493 (1981). There, the court dismissed a petition for certification because "...although petitioner did use the phrase 'full faith and credit' at several points in the proceedings below, nowhere did she cite to the Federal Constitution or to any cases relying on the full faith and credit clause of the Federal Constitution." *Id.* at 1891. The record in the instant case substantiates respondent's contention that the petitioner has failed to raise or preserve a valid claim either expressly or by clear implication sufficient to comport with the statutory requirement. Accordingly, respondent respectfully submits that in the absence of any specific reference to the Fifth and Fourteenth Amendments below the petitioner must be precluded from advancing a due process argument before this Court.

PETITIONER'S AUTHORITIES DISTINGUISHED

Petitioner relies heavily on *Sotomura v. County of Hawaii*, 460 F. Supp. 473 (D. Hawaii, 1978), and *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673 (1930) to support his posture that the remedy designed by the lower court constituted an unjust taking without compensation. It is unquestionable that the court would be acting unlawfully were it to deprive petitioner of his property rights without due process. However, closer inspection will reveal that petitioner is unable to substantiate such a claim.

In *Sotomura*, the trial court re-defined the seaward boundary of plaintiff's land to determine the extent of the erosion and the size of plaintiff's land which ultimately reduced the compensation paid to plaintiff. The District Court properly held that such a

decision did in fact constitute a taking without just compensation. That decision however must be distinguished from petitioner's claim because there is no credible evidence offered by petitioner to show that the alleged redefinition and redistribution of petitioner's rights and obligations under the contract would necessarily work to his fiscal detriment and thus constitute a confiscatory taking. Furthermore, to the extent the remedy provided by the court below did work to petitioner's detriment, such would be entirely owing to his continuing failure to comply with his contractual obligations.

Though petitioner also relied heavily on the court's opinion in *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673 (1930), he misinterpreted the reasoning in that opinion in applying it to the facts of the instant case. The court in *Brinkerhoff-Faris* stated that "...whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Id.* at 682.

It is undisputed that a state may not deprive any person of the existing remedies for the enforcement of a right. However, the court should note that petitioner had, for almost two years, the very real opportunity to protect the right he now claims has been usurped. It was solely in response to petitioner's failure to fulfill his contractual obligations that respondent was forced to seek such a remedy as the lower courts have awarded him.

CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain its burden under 28 U.S.C. Section 1257(3) to demonstrate that a writ of certiorari should issue. No constitutional question was specifically raised or clearly implied in the court below. The Appellate Division of the New Jersey Superior Court was correct in affirming the lower court's grant of eventual specific performance and in judging such relief to be an appropriate remedy. The New Jersey Supreme Court was correct in denying the petition for certification.

For the reasons set forth above, the respondent herein submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

STEPHEN S. WEINSTEIN
Attorney for Petitioner

APPENDIX A — EXCERPTS OF APPELLATE DIVISION BRIEF

POINT V

THE SPECIFIC PERFORMANCE ORDERED BY THE COURT WAS PERFECTLY LEGAL AND APPROPRIATE

Throughout this point defendant mistakenly asserts that the Order entered by the trial court is improper because it attempts to control the decision of the Montville Township Planning Board. A careful reading of the Order (Da 26 to 30) reveals that the Order does not do so, as will be developed herein. If the Order does not compel the Planning Board to act, then defendant's argument must fail.

Defendant relies heavily on the case of *Popular Refreshments, Inc. v. Fuller's Milk Bar, etc.*, 85 *N.J. Super.* 528 (App. Div. 1964), certif. den. 44 *N.J.* 409 (1965) for the proposition that specific performance cannot be decreed where compliance rests in the will or discretion of a third party not controlled by the defendant. (Db 29-20 to 30-10). At first blush, the two cases appear similar in that both involved contracts to convey real estate which were conditioned (impliedly in *Popular Refreshments*) upon subdivision approval by a local planning board. In both cases, it appeared that the defendant-seller was reluctant to sell and "...found welcome escape...in the providential refusal of the planning board to approve the subdivision." *Id.* at 536. The actual denial of approval in *Popular Refreshments, supra.*, at 533, is an important distinguishing factor.

In the present case, defendant's application was withdrawn as opposed to being denied. Nor was an approval of the denial

taken in *Popular Refreshments, supra.*, at 534, and the court expressed strong doubts an appeal would have succeeded in light of a zoning ordinance amendment. *Id.* at 539. Thus, the available remedy to the court in *Popular Refreshments* necessarily would have mandated an attempt to order a third party, i.e. the planning board, to do something, i.e. approve the subdivision in order to be able to compel specific performance of the conveyance by defendant.

In contrast, in the case at bar, the court has not ordered defendant to convey the property. Rather, defendant has been ordered to specifically perform the obligation he voluntarily undertook in Paragraph 2 of the contract, (Da 45), namely to diligently pursue obtaining the subdivision. Defendant repeatedly fails to recognize the distinction between compelling specific performance of the conveyance as opposed to specific performance of the obligation to diligently pursue approval of the subdivision. If and when the planning board denies defendant's application, then the case would be at the same juncture as *Popular Refreshments* in that the condition precedent was unfulfilled, thus negating an obligation to convey.

Finally, the court in *Popular Refreshments* expressed strong reservations about the likelihood of approval, assuming the defendant had submitted revised plans. There is no reason for such pessimism in the instant case. The revised plans submitted by Mr. Costic, defendant's engineer, were prepared in response to a meeting with Mr. Vitale, the township engineer. Mr. Costic understood the townships ordinance concerning soil removal and prepared the revised plans accordingly, reducing the proposed

amount of soil removal from 382,000 cubic yards to 100,000 cubic yards. There was no testimony presented which indicated a likelihood that the application would be rejected.

Defendant's reliance upon the case of *DiCataldo v. Harold Corp.*, 15 *N.J. Super.* 471 (Ch. Div. 1951), is also misplaced for two reasons. First, as in *Popular Refreshments, supra,* the specific performance requested would have required an attempt by the court to order the F.H.A. or the V.A. to approval something, in that case, house plans. However, as pointed out, *supra.*, Judge Stein's order in no way even suggests an attempt to order the Montville Township Planning Board to take a certain course of action. Second, the contract plaintiff sought specific performance of in *DiCataldo, supra.*, at 477, involved construction of a building. Traditionally courts will not become involved in enforcing a construction contract due to the adequacy of the remedy of money damages and the practical inability of the court to supervise performance. *Id.* at 478. The present case does not involve construction of any buildings. Defendant claims it would involve judicial supervision of installation of the improvements. (Db 31-24). This is not so because if the subdivision is granted, Montville Township will be overseeing that the improvements are installed as required by the terms of the subdivision approval.

In the third case cited by defendant, *Fiedler, Inc. v. Coast Finance Co., Inc.*, 129 *N.J. Eq.* 161 (E & A 1940) specific performance is again rejected because the court's decree would have ordered the F.H.A. to act and the court noted its lack of jurisdiction and authority to do so. *Id.* at 169. Plaintiff reiterates that Judge Stein carefully framed the relief so that it did not

attempt to order the Montville Township Planning Board to act. Hence, *Fiedler, Inc., supra.,* is not dispositive.

Defendant then argues that because the original contract does not specifically describe the work he was to perform for subdivision approval, specific performance was an inappropriate remedy. (Db 30-11). Paragraph 7 of the contract (Da 48) essentially states that the seller will do whatever work is required by the township in order to obtain approval pertaining to municipal improvements and the installation of gas, electric, telephone and water lines. For defendant to now request more specificity or a monetary limit on his obligation would be tantamount to asking the court to rewrite the contract in a manner more favorable to him. As defendant himself states, the court should not make a better contract for either party, citing *Kampf v. Franklin Life Ins. Co.,* 33 *N.J.* 36, 43 (1960). (Db 33-10)

Similarly the defendant points out other potential problems that could arise with respect to modification of the subdivision application. (Db 31-10). However, assuming, *arguendo,* that these problems potentially exist, their potential was inherent in the original contract itself which defendant knowingly and voluntarily signed. It would have been inappropriate for the court to have put limitations on defendant's contractual obligation to diligently pursue the subdivision which contemplated changes in the application. (Da 45). In essence, the court would then have been entering the forbidden sphere of rewriting the contract.

Defendant claims that the trial court improperly rewrote the contract when it substituted plaintiff for defendant as the party

to pursue the subdivision application and do the required improvements. (Db 32-12 to 33-11). It became clear to the court that defendant was looking for a way to avoid performance of the contract as evidenced by his official reason for cancellation, namely that his wife was on the deed, when he was no longer even married to her at the time the letter was written. (TII 46-19 to 24; 48-19 to 23). It would been futile to order defendant to pursue the application. In all likelihood the plaintiff would have been returning to court in short order complaining that defendant was not complying. Or the scenario of *Popular Refreshments, supra.*, at 533 could occur where the defendant did not revise the submitted plans as requested and simply accepted the planning board's denial. That would not fly in the present case since there is an obligation to diliqently pursue approval.

Judge Stein did not alter or modify what was to be done. Rather he astutely foresaw certain likely problems with the defendant and took precautionary steps by ordering Mr. Morel to act. Plaintiff, as purchaser, is certainly an interested party and has a vested interest in obtaining subdivision approval. Paragraph 2 of the contract specifically authorizes plaintiff to review changes in the plans and participate in Planning Board meetings and discussions with municipal officials. (Da 46-1 to 4). Thus he is not an improper or inappropriate party to seek the subdivision. In *Gulf Oil Corp. v. Montanaro,* 94 *N.J. Super.* 348, 352 (Ch. Div. 1967), the plaintiff purchaser made the application for subdivision approval and the court made no suggestion that there was anything improper and seemed to imply that plaintiff could have been criticized if it did nothing. See also *Popular Refreshments, supra.*, at 539 where the court discusses that either

plaintiff or defendant could have pursued remedies pertaining to the planning board's decision.

As far as defendant's concern that with plaintiff acting, the costs will be exorbitant, he is not without remedy.* Judge Stein specifically stated that if such a dispute arises over the application, he will determine what is fair and appropriate. (TII 56-23 to 57-2). This is consistent with the discretionary powers of the Chancery Court and the equitable nature of the remedy. *Weisbrod v. Lutz,* 190 *N.J. Super.* 181, 186 (App. Div. 1983). In *Weisbrod, supra.,* at 185, interest rates had risen dramatically from the time the contract was originally entered. The trial court decided not to enforce a decree of specific performance under the circumstances and the Appellate Division affirmed the decision. Thus defendant is not permanently locked in, for example, if the planning board approved no soil removal, only ten lots and the cost of improvements had increased to $2,000,000 thus resulting in a $1,500,000 loss.

Just as the figures set forth by plaintiff above are purely hypothetical, the court should realize that the defendant's mathematical analysis is also not based on reality. Defendant sets forth calculations which are designed to lead this court to believe that defendant has lost over $2,000,000 as a result of Judge Stein's decision. (Db 34-4 to 12). The argument is specious. Judge Stein found, based on ample testimony, that defendant, when he entered

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*To date there is no factual support for any claim by defendant that plaintiff is not acting in a fiscally prudent manner. The expenditures up to July 31, 1987 total $11,057.24 which include calculations for time spent by Mr. Morel and other personnel of the corporation. (Pa 1 to 15).

the contract, knew he would not be permitted to remove 382,000 cubic yards of soil. Thus defendant never expected to obtain $2,000,000 for the fill.* Under the revised plans submitted with defendant's authority, defendant would still receive approximately $500,000 for the fill, resulting in a profit of $1,900,000.

The order of the trial court was carefully tailored to comply with the terms of the contract as written and to merely accomplish what had not been done as a result of defendant's breach. Both parties are still in position to receive what they originally bargained for under the terms of the order. Not only was the order legally proper, it should serve as a model of how well a chancery court can function using its equitable powers.

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*The testimony was that the price of fill ranged from $4 to $5 per cubic yard. Multiplying 382,000 cubic yards by the price of $4 to $5 would have resulted in a maximum realization of $1,528,000 to $1,910,000 breach.